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IN THE

Supreme Court of the United States

October Term, 1961

No. ~~900~~ 135

ESSO STANDARD OIL COMPANY, a corporation,

Petitioner,

vs.

EDNA FALL, as Administratrix of the Estate of PHILLIP FALL, deceased,

Respondent.

Petition For Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Petition For Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

The opinion of the Court of Appeals for the Fifth Circuit is reported at 297 F.2d 411, and is copied in full in Appendix A of the petition.

JURISDICTION

Jurisdiction of this Court is invoked by petitioner under 28 U.S.C. Section 1254 (1).

QUESTION PRESENTED

1. Where a Court of Appeals grants a new trial for errors in submission of issues to the jury is there a violation of the Seventh Amendment of the Constitution?

2. Where the Court of Appeals did not decide the issues controlling an alleged conflicting opinion should the petition for certiorari be denied?

3. Where the Court of Appeals referred to the Switchblade Act to support its holding that it was a jury question whether the switchblade knife was a dangerous weapon, is this an ex post facto application of a criminal statute or a violation of the Fifth Amendment of the Constitution?

4. Did the Court of Appeals err in holding that contributory negligence should not have been submitted to the jury?

5. Where the petitioner fails to include as a question presented one of the reasons stated by the Court of Appeals for granting a new trial is this not persuasive in denying the petition for certiorari?

STATEMENT

Respondent's decedent, Phillip Fall, was stabbed and killed by Jimmy Murphy on petitioner's S.S. "Esso Augusta" at the Esso Standard Refinery docks, Baton Rouge, Louisiana. Both were crew members of this vessel, Fall as an electrician and Murphy as a crew messman. Mur-

phy's fatal weapon was a common switchblade knife which he kept in open view on a box adjacent to his bunk.

On the evening of the fatality Murphy and Fall quarreled and scuffled in a local bar. Later they again argued while proceeding in an Esso jitney from the refinery entrance to the dock area. At the dock area an attempted assault by Murphy was prevented by Esso guards, Murphy was admonished and escorted to the gangway.

Shortly thereafter Murphy proceeded hurriedly from his quarters through the mess room to Fall's room. He was seen by Third Assistant Engineer Schuler, who not only observed that Murphy was drunk, but saw the switchblade knife in Murphy's hand and heard him mutter something about getting the electrician. About a half minute later he followed Murphy and found him with the open switchblade knife in his hand struggling with Fall. Schuler finally stopped the assault and forced Murphy to drop the knife. Fall staggered from his quarters to the dock where he collapsed, was removed by ambulance and died thereafter as a result of the stabbing.

Respondent sued petitioner alleging negligence under the Jones Act, 46 U.S.C. Section 688, and unseaworthiness under the general maritime law. The case was submitted to the jury solely on the negligence count on issues severely limited by the trial judge resulting in a jury verdict for the shipowner. Final Judgment for petitioner was reversed on questions of law by the Court of Appeals for the Fifth Circuit at 297 F.2d 411.

REASONS FOR DENYING THE WRIT OF CERTIORARI

Respondent respectfully submits that this petition should be denied for the following reasons:

I.

REMAND FOR NEW TRIAL BY THE COURT OF APPEALS DOES NOT VIOLATE THE SEVENTH AMENDMENT OF THE CONSTITUTION.

On appeal from a jury verdict and judgment in favor of petitioner the Court of Appeals reversed and remanded for new trial. It held the trial court erred in refusing to submit to the jury under appropriate charges the following issues: (1) whether the switchblade knife was a dangerous weapon under 18 U.S.C.A. Section 2277; (2) whether the shipowner knew or should have known that Murphy had the switchblade knife on the vessel and confiscated it; and (3) whether the shipowner negligently failed to comply with its absolute duty to furnish the seaworthy vessel. It also held that the trial court erred in submitting contributory negligence to the jury and in improperly restricting respondent's impeachment and examination of the Chief Mate. Where, as here, the Court of Appeals reverses a jury verdict for errors in submission of issues to the jury under appropriate charges, i.e., on questions of law, and remands the case for new trial this does not violate and, on the contrary, is in accord with the Seventh Amendment. **Gasoline Products Company v. Champlin Refining Company**, 283 U.S. 494; **Slocum v. New York Life Insurance Company**, 228 U.S. 364; **Capital Traction**

Company v. Hof, 174 U.S. 1; C.A. **Treat Manufacturing Company v. The Standard Steel & Iron Company**, 157 U.S. 674; **Mutual Benefit Health & Accident Ass'n v. Bowman**, 8th Cir., 99 F.2d 856. Petitioner errs in arguing that this reversal and direction of a new trial is an unconstitutional infringement of the jury's findings of fact. Not only has there been no interference or re-examination of fact findings of the jury, but the jury was not even permitted to consider these issues. Actually the Court did not permit the jury to decide whether the switchblade knife was a dangerous weapon nor did it permit the jury to consider the negligence this created (N.T. 445-457, 471, 474, 501-505) and so charged the jury (N.T. 518).[1] Appropriate exceptions were taken to the Court's refusal to charge on these issues (N.T. 457). There is no constitutional issue in this case.

II.

THERE IS NO CONFLICT WITH CONNOLLY v. FARRELL LINES INC., 1ST CIR., 268 F. 2D 653.

In Connolly v. Farrell Lines Inc., supra, the court sustained a directed verdict holding: (1) that the seaman failed to prove negligence of the shipowner in employing a dangerous seaman; and (2) that the assault and the weapon were insufficient to sustain a finding of a substandard seaman, i.e., unseaworthiness. Neither of these issues in Connolly were decided by the Fifth Circuit. Respondent did not contend that the shipowner was negligent in hiring or continuing the employment of a known dangerous seaman and the reversal by the Court of Appeals

[1] "N.T." refers to reporter's notes of testimony

was not predicated in any way on this theory of negligence. The second point of the Connolly opinion, unseaworthiness, was likewise not reached in the opinion below, but the court merely refused to decide at this time whether the respondent could enforce a death claim for unseaworthiness. Not only is there no conflict with **Connolly** v. **Farrell Lines Inc.**, supra., but the Connolly decision itself is in conflict with **Boudoin** v. **Lykes Bros. Steamship Company Inc.**, 348 U.S. 336; **Jones** v. **Lykes Bros. S. S. Co.**, 2d Cir., 205 F. 2d 815; **Keen** v. **Overseas Tankship Corp.**, 2d Cir., 194 F.2d 515.

Respondent's complaint about the appellate court's suggestion that the trial judge submit interrogatories to the jury on negligence, negligent unseaworthiness, and non-negligent unseaworthiness does not warrant review by this Court. This suggestion merely recognizes that the courts have neither reached nor discussed this issue since **Lindgren v. United States**, 281 U.S. 38, and it is currently the subject of vigorous and heated litigation. **Kernan, Admr. v. American Dredging Co.**, 355 U.S. 426; **Turcich, Admx. v. The Liberty Corporation**, 3rd Cir., 217 F.2d 495; **Gill** v. **United States**, 2nd Cir., 184 F.2d 49, 57 (dissent).

III.

REFERENCE TO THE SWITCHBLADE ACT, 15 U.S.C. SECTION 1241 WAS NOT ERROR.

Since the Switchblade Act was enacted after Fall's death the court could not and did not construe this Act together with the Dangerous Weapon Act (18 U.S.C. Section 2277) to hold that Murphy's switchblade knife was a dangerous weapon as a matter of law. The Switchblade

Act simply demonstrated that the Congress of the United States considered a switchblade knife to be a dangerous weapon, that a jury had the right to agree with the Congress and that the trial court erred in prohibiting the jury from so doing. In this context reliance on the Switchblade Act was not an **ex post facto** application of a criminal statute or a violation of the Fifth Amendment of the Constitution.

IV:

THERE WAS NO ISSUE OF CONTRIBUTORY NEGLIGENCE TO SUBMIT TO THE JURY.

Although Fall and Murphy quarreled twice earlier in the evening, they were separated at the vessel and went to their respective quarters. Thereafter Murphy took his switchblade knife, proceeded through the mess room to Fall's room and stabbed him. No one witnessed the onset of the fatal assault and the stabbing except Fall and Murphy. Murphy testified by deposition that he did not remember what occurred when he arrived at Fall's quarters. There was no competent evidence to establish that Fall was either the aggressor or was otherwise guilty of negligence after the men boarded the vessel. Petitioner repeatedly refers to Murphy's written statement given to the local police to argue that Fall was the aggressor at the time of the fatal assault. However, this statement was admitted solely to impeach Murphy's amnesia with the proviso that it did not and could not prove the facts set forth therein (N.T. 281). Thus, petitioner failed to sustain its burden on contributory negligence and the court below correctly held there was no jury issue. Petitioner errs in stating that respondent did not object to petitioner's request for a charge on contributory negligence (N.T. 486).

V.

PETITIONER'S FAILURE TO CERTIFY AS A QUESTION PRESENTED ONE OF THE REASONS FOR GRANTING A NEW TRIAL SHOULD BE PERSUASIVE IN DETERMINATION OF THIS PETITION.

One of the grounds for granting a new trial was the trial court's error in prohibiting impeachment of the Chief Mate and use of his pre-trial deposition. Petitioner has not assigned this ruling as a question presented. Under these circumstances this Court should remand this case to the District Court for a new trial since this Court has held repeatedly it will not consider errors not assigned by the petitioner. **Mazer v. Stein**, 347 U.S. 201; **United States v. Crescent Amusement Co.**, 323 U.S. 173; Supreme Court Rule 40(1)(d)(2).

CONCLUSION

Respondent respectfully submits that this Petition for Writ of Certiorari should be denied for the reasons set forth above.

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to Supreme Court Rule 33(1) copies of the foregoing brief were served upon Walter X. Connor, 120 Broadway, New York, N. Y., and Louis Kurz, Jr., 704 Florida Theatre Building, Jacksonville, Florida, attorneys for petitioner, by depositing same in the United States Post Office with first class air mail postage prepaid thereon on this _____ day of June, 1962.

William M. Alper